Lau Tiong Ik Construction Sdn Bhd v Lau Chung Ping & Anor

HIGH COURT (SIBU) — SUIT NO SBW-22NCvC-8/3 OF 2014
SUPANG LIAN J
4 DECEMBER 2015

Civil Procedure — Res judicata — Earlier suit withdrawn without being adjudicated — Whether present claim res judicata

Companies and Corporations — Shares — Dealing by company in its own shares — Shares of company sold to brother of company's managing director — Sale of shares not approved by general meeting — Whether shares transaction caught by ss132(1)(b) or 132E(1)(a) of the Companies Act 1965 — Whether transaction void — If void, whether purchaser bound to retransfer shares — Whether rule in Turquand's case applicable — Whether exception under s 132C(3) of the Companies Act 1965 applicable — Companies Act 1965 ss 132(1)(b) & (3), 132E(1)(a) — Contracts Act s 66

Limitation — Statute of Limitation — Sarawak Limitation Ordinance — Claim for return of shares held on trust — Whether claim time-barred by s 3 of the Ordinance — Whether claim within ambit of Item 97 of Schedule to the Ordinance and/or s 9 of the Ordinance — Whether period provided in s 162(4) of the Companies Act 1965 prevails over limitation period in s 5 of the Limitation Ordinance Sarawak — Companies Act 1965 s 162(4) — Limitation Ordinance Sarawak ss 3, 5 & 9

Trusts and Trustees — Trusts — Shares of company — Whether express trust created — Whether shares transferred to defendant on trust and not outright sale — Whether existence of constructive trust established by plaintiff

The plaintiff was a family construction business incorporated in 1997 and run by its then managing director, Lau Choon Liong ('PW2'). The first defendant was the younger brother of PW2. The second defendant was a property company which owned a large piece of land in Kuching. The plaintiff was the owner and shareholder of the second defendant and had 2,001,472 shares at RM1 per share in it ('the shares'). On 16 June 1998, the plaintiff transferred the shares to the first defendant. In 2009, the plaintiff initiated Sibu High Court Suit No 2722–11 of 2009 ('the 2009 Suit') seeking a declaration that the first defendant held the shares in trust for the plaintiff and demanding for the return

of the shares. However, the suit was later withdrawn and struck out. In 2012, the plaintiff was wound up and one Wong Ching Yong ('PW1') was appointed as the liquidator of the plaintiff. On 13 March 2014, PW1 under the name of the plaintiff filed this action to seek the return of the shares transferred to the first defendant by the plaintiff on 16 June 1998. The following issues arose for determination: (a) whether the first defendant held the shares in the second defendant in trust for the plaintiff; (b) whether the plaintiff's action was an abuse of court process and/or res judicata; (c) whether the plaintiff's action was time-barred under the Sarawak Limitation Ordinance ('the Ordinance'); (d) whether the transfer of the subject shares between the plaintiff and the first defendant was a transaction caught by ss 132C(1)(b) or 132E(1)(a) of the Companies Act 1965 ('the CA'); and (e) whether the plaintiff was entitled to any relief as claimed against the first and second defendants. The first defendant raised a preliminary issue that the pleaded case and the evidence adduced was that the shares were transferred to the first defendant to hold on trust. Therefore, the first defendant claimed that the plaintiff's allegation that the transfer of shares was null and void in breach of ss 132C(1)(b) and/or 132E(1)(a) of the CA could not stand as it was contradictory to the plaintiff's claim based on trust. The first defendant also raised the issue of illegality contending that the motive behind the restructuring and the transfer of the shares to the first defendant was to prevent the creditors of the plaintiff at that time getting their hands on the shares. The first defendant submitted that such arrangement was illegal being an attempt to defraud the plaintiff's creditors by preventing them from realising the shares to pay off the plaintiff's debts. Such an arrangement was said to be unlawful and void under s 24(e) of the Contracts Act 1950 for being immoral or opposed to public policy.

Held, allowing the plaintiff's claim with costs:

(1) The pleaded case of the plaintiff was that the shares were transferred to the first defendant to be held on trust. The plaintiff had also pleaded in the alternative for a declaration that the transfer of the shares was null and void as it contravened ss 132C and 132E of the CA. It was the first defendant's case at all times that the transfer of the subject shares was an outright business sale. If that was so, the sale would be caught by ss 132C and 132E as a business sale of a company's asset amounting to disposal. The plaintiff's case in the alternative was therefore to meet the case of the first defendant that the transfer was a genuine disposal. Hence, there was no merit in the preliminary issue raised by the first defendant (see para 8).

(2) There was certainty of intention that the shares were to be transferred to the first defendant to be held in trust. The subject-matter was certain as well in the form of the shares that were to be transferred. The same was true of the object which was that the shares were to be returned to the plaintiff at the appropriate time. Hence, an express trust was created. Further, the first defendant would be unjustly enriched at the expense of

the genuine contributories and creditors of the plaintiff company if he were allowed to keep the subject shares for which he did not pay a single cent. A constructive trust therefore must be imputed on the first defendant (see paras 58 & 62).

(3) The 2009 Suit was withdrawn and struck before the pleadings were closed. There was no adjudication of the case and no finding made by the court on the merits of the claim. Hence, the first defendant's contention that the present claim was res judicata and therefore an abuse of court process was unmeritorious if not vexatious (see para 65).

(4) The first defendant had singularly refrained to state in his evidence that he had paid by cash, cheque or any other valuable consideration for the shares. The first defendant therefore had failed to prove on balance of probabilities that he was a purchaser for valuable consideration. Given the surrounding circumstances at the time of the transaction, especially that the first defendant was a director of the second defendant at the material time, the first defendant should have been put on enquiry as to the authority of PW2 to effect the transfer of the shares to him. The first defendant therefore could not be heard to say that he was entitled to invoke the benefit of the rule in *Turquand*. Hence, the first defendant had failed to prove on balance of probabilities that he was a purchaser without actual notice of the contravention. The first defendant had actual notice of the contravention and he was a purchaser without valuable consideration. Thus, he could not rely on the exception under s 132C(3) to the CA to enforce the transaction and the transaction was void and invalid against him (see paras 76–77 & 80–81).

(5) The first defendant was the brother of the plaintiff's managing director. Under s 122A(1)(a) and (2) of the CA, a brother of a director is a person connected to such a director. Secondly, the transaction was a transfer of the shares from the plaintiff company to the first defendant, a person connected to a director. The first defendant therefore had acquired the non-cash asset that the company had disposed of. Thirdly, the shares were at least worth RM1,631,200. In view that the transaction was not first approved by a resolution of the plaintiff's general meeting, the transaction was in breach of s 132E of the CA and voidable at the company's instance (see para 84).

(6) Under s 66 of the Contracts Act 1950, when a contract becomes void (as in the present case) the party who has received any advantage under the contract or agreement is bound to restore it to the person to whom he received it. Hence, the first defendant in the present case was bound to restore the shares to the plaintiff by transferring them back to the plaintiff (see para 85).

(7) The shares in the present case had become vested in trust in the first defendant for a specific purpose. For that reason, this suit against him was not barred by any length of time. The plaintiff's claim could also come within the ambit of Item 97 of the Schedule to the Ordinance. This suit was for the return of the shares held in trust by the first defendant. Since there was no provision elsewhere in the Schedule for such claims, Item 97 should apply. Hence, time began to run when the right to sue accrued. The right to sue in the present case accrued when the plaintiff became aware that the first defendant refused to return the shares to the plaintiff. This arose when the plaintiff demanded for the return of the shares in 2009 by commencing Suit 2009 but the first defendant disputed the claim. Since the present suit was commenced in 2014 it was well within the limitation period of six years (see paras 89–91).

(8) Section 162(1)(a) of the CA gives the court the power to rectify the share register if the name of any person is entered in without sufficient cause. The transfer of the shares to the first defendant was in contravention of ss 132C and 132E of the CA rendering the transfer or transaction null and void. For that reason, the name of the first defendant in the share register was entered in without sufficient cause. Under s 162(4) of the CA, the time limit for the application to rectify the register is within 30 years of the making of the entry. By virtue of s 5 of the Ordinance, the period of limitation prescribed in s 162(4) of the CA prevails over any prescribed in the Ordinance. The entry in the register of the second defendant having been made in 1998 and the present application filed in the year 2014, the application was well within time (see para 92).

[Bahasa Malaysia summary

Pihak plaintif merupakan sebuah perniagaan pembinaan keluarga yang didaftarkan pada 1997 dan diuruskan oleh pengarah urusannya yang dahulu, Lau Choon Liong (SP2). Defendan pertama merupakan adik bongsu SP2. Defendan kedua merupakan sebuah syarikat hartanah yang memiliki sekeping tanah yang luas di Kuching. Pihak plaintif merupakan pemilik dan pemegang syer defendan kedua dan mempunyai 2,001,472 syer pada harga RM1 setiap syer dalamnya ('syer'). Pada 16 Jun 1998, pihak plaintif telah memindahkan syer itu kepada defendan pertama. Pada tahun 2009, pihak plaintif telah memulakan saman Mahkamah Tinggi Sibu Saman No 2722–11 Tahun 2009 ('Saman 2009') memohon suatu deklarasi bahawa defendan pertama memegang syer secara amanah bagi pihak plaintif dan menuntut supaya syer itu dipulangkan. Walau bagaimanapun, saman itu kemudiannya ditarik balik dan dibatalkan. Pada tahun 2012, pihak plaintif telah digulungkan dan seorang Wong Ching Yong ('SP1') dilantik sebagai likuidator bagi plaintif. Pada 13 Mac 2014, SP1 di bawah nama plaintif memfailkan tindakan ini untuk menuntut pemulangan syer yang dipindahkan kepada defendan pertama oleh plaintif pada 16 Jun 1998. Isu yang berikut berbangkit untuk

diputuskan: (a) sama ada defendan pertama memegang syer defendan kedua sebagai amanah bagi pihak plaintif; (b) sama ada tindakan plaintif merupakan suatu penyalahgunaan proses mahkamah dan/atau res judicata; (c) sama ada tindakan plaintif telah dihalang oleh had masa di bawah Ordinan Had Masa Sarawak ('Ordinan'); (d) sama ada pemindahan syer antara plaintif dengan defendan pertama merupakan suatu transaksi yang termasuk di bawah ss 132C(1)(b) atau 132E(1)(a) Akta Syarikat 1965 ('AS'); dan (e) sama ada plaintif berhak kepada apa-apa relif yang dituntut terhadap defendan pertama dan kedua. Defendan pertama telah membangkitkan isu awal bahawa kes yang dimohon dan keterangan yang dikemukakan adalah bahawa syer itu dipindahkan kepada defendan pertama untuk dipegang sebagai amanah. Oleh yang demikian, defendan pertama menghujahkan yang penyataan plaintif bahawa pemindahan syer itu adalah tidak sah dan terbatal yang melanggar ss 132C(1)(b) dan/atau 132E(1)(a) AS tidak boleh dipertahankan kerana ia bercanggah dengan tuntutan plaintif yang menyatakan bahawa ia berdasarkan kepada kepercayaan. Defendan pertama juga membangkitkan isu ketidaksahan dengan menghujahkan bahawa motif di sebalik penstrukturan semula dan pemindahan syer kepada defendan pertama adalah untuk menghalang para pemiutang plaintif pada ketika itu daripada mendapatkan syer itu. Defendan pertama menghujahkan bahawa tindakan itu adalah tidak sah kerana ia merupakan suatu cubaan untuk memperdaya pemiutang plaintif dengan menghalang mereka daripada menyedari tentang syer itu untuk membayar hutang plaintif. Perkiraan sebegitu dikatakan tidak sah dan terbatal di bawah s 24(e) Akta Syarikat 1950 kerana ia merupakan suatu perkiraan yang tidak bermoral atau bercanggah dengan polisi awam.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Kes plaintif yang diplidkan adalah syer yang dipindahkan kepada defendan pertama hendaklah dipegang sebagai amanah. Plaintif juga memplidkan, sebagai alternatif, untuk suatu deklarasi bahawa pemindahan syer itu terbatal dan tidak sah kerana ia bercanggah dengan ss 132C dan 132E AS. Adalah menjadi kes defendan pertama pada setiap masa bahawa pemindahan syer itu merupakan suatu penjualan urus niaga. Jika sedemikian, maka penjualan itu termasuk dalam ss 132C dan 132E kerana penjualan aset syarikat terjumlah kepada suatu pelupusan. Kes plaintif, sebagai alternatif, bertujuan untuk menafikan kes defendan pertama bahawa pemindahan itu merupakan suatu pelupusan yang nyata. Oleh itu, tidak terdapat merit kepada isu awal yang dibangkitkan oleh defendan pertama (lihat perenggan 8).

(2) Terdapat niat yang jelas bahawa syer tersebut akan dipindahkan kepada defendan pertama untuk dipegang sebagai amanah. Hal perkara itu adalah pasti dalam bentuk syer yang hendak dipindahkan. Hal yang sama adalah benar bahawa syer tersebut hendaklah dikembalikan kepada plaintif pada masa yang sesuai. Maka, suatu amanah yang nyata telah

dibuat. Selanjutnya defendan pertama akan dikayakan secara tidak adil sehingga menjejaskan penyumbang dan pemiutang tulen syarikat plaintif jika defendan pertama dibenarkan untuk memegang syer itu yang beliau tidak membayar satu sen pun. Oleh yang demikian, suatu amanah konstruktif hendaklah dikaitkan kepada defendan pertama (lihat perenggan 58 & 62).

(3) Saman pada tahun 2009 telah ditarik balik dan dibatalkan sebelum pliding ditutup. Tiada penghukuman berhubung dengan kes itu dan tiada dapatan dibuat oleh mahkamah berdasarkan merit kes tersebut. Maka, hujahan defendan pertama bahawa tuntutan ini telah menjadi res judicata dan suatu penyalahgunaan proses mahkamah menjadi tidak bermerit jika tidak pun, menyusahkan (lihat perenggan 65).

(4) Defendan pertama sahaja menahan dirinya daripada menyatakan dalam keterangannya yang dia dibayar dalam tunai, cek atau apa-apa pertimbangan berharga bagi syer tersebut. Defendan pertama telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa dia ialah seorang pembeli untuk balasan bernilai. Melihat kepada keadaan sekeliling semasa transaksi ini, terutamanya apabila defendan pertama merupakan pengarah kepada defendan kedua pada masa yang material, defendan pertama sepatutnya disiasat berhubung dengan autoriti SP2 untuk melaksanakan pemindahan syer itu kepadanya. Oleh yang demikian, defendan pertama tidak boleh menyatakan bahawa dia berhak untuk menggunakan kelebihan kaedah Turquand. Maka, defendan pertama telah gagal membuktikan atas imbangan kebarangkalian bahawa dia merupakan pembeli tanpa notis pelanggaran yang nyata. Defendan pertama telah mempunyai notis pelanggaran yang nyata dan defendan pertama merupakan seorang pembeli tanpa balasan yang bernilai. Justeru, dia tidak boleh bergantung kepada pengecualian di bawah s 132C(3) AS untuk menguatkuasakan transaksi itu dan transaksi itu terbatal dan tidak sah terhadapnya (lihat perenggan 76–77 & 80–81).

(5) Defendan pertama merupakan adik kepada pengarah urusan plaintif. Di bawah s 122A(1)(a) dan (2) AS, adik kepada pengarah merupakan seseorang yang mempunyai kaitan dengan pengarah itu. Keduanya, transaksi itu merupakan suatu pemindahan syer daripada syarikat plaintif kepada defendan pertama, seseorang yang mempunyai kaitan dengan pengarah. Oleh yang demikian, defendan pertama telah mendapat aset tanpa tunai yang syarikat itu telah lupuskan. Ketiganya, syer itu bernilai sekurang-kurangnya RM1,631,200. Mengambil kira bahawa transaksi itu tidak diluluskan terlebih dahulu oleh suatu resolusi dalam mesyuarat agung plaintif, transaksi itu telah melanggar s 132E AS dan terbatal atas permintaan syarikat (lihat perenggan 84).

(6) Di bawah s 66 Akta Syarikat 1950, apabila suatu kontrak menjadi tidak sah (sebagaimana dalam kes ini) pihak yang mendapat kelebihan di

bawah kontrak atau perjanjian itu hendaklah memulangkan kelebihan itu kepada orang yang dia terima daripadanya. Maka, defendan pertama dalam kes ini hendaklah memulangkan kembali syer kepada plaintif dengan memindahkan semula syer itu kepada plaintif (lihat perenggan 85).

(7) Syer dalam kes ini telah diletakkan sebagai amanah kepada defendan pertama untuk suatu sebab tertentu. Oleh sebab itu, saman terhadap plaintif pertama ini tidak terhalang oleh mana-mana tempoh masa. Tuntutan plaintif boleh juga termasuk dalam lingkungan Butiran 97 Jadual Kedua kepada Ordinan. Saman ini adalah untuk pemulangan syer yang dipegang secara amanah oleh defendan pertama. Oleh sebab tidak terdapat peruntukan lain dalam Jadual Kedua bagi tuntutan tersebut, Butiran 97 hendaklah terpakai. Maka, masa telah mula berjaan apabila hak untuk menyaman timbul. Hak untuk menyaman dalam kes ini timbul apabila plaintif mengetahui bahawa defendan pertama tidak mahu memulangkan syer itu kepada plaintif. Hal ini timbul apabila plaintif menuntut pemulangan syer pada tahun 2009 dengan memulakan Saman 2009 tetapi defendan pertama menafikan tuntutan itu. Memandangkan saman ini dimulakan pada tahun 2014, maka ia masih dalam tempoh had masa enam tahun (lihat perenggan 89–91).

(8) Seksyen 162(1)(a) AS memberi mahkamah kuasa untuk membetulkan daftar syer jika nama mana-mana orang dimasukkan tanpa sebab yang mencukupi. Pemindahan syer kepada defendan pertama melanggar ss 132C dan 132E AS yang menyebabkan pemindahan atau transaksi itu terbatal dan tidak sah. Atas sebab itu, nama defendan pertama dalam daftar syer telah dimasukkan tanpa sebab yang mencukupi. Di bawah s 162(4) AS, had masa bagi permohonan untuk membetulkan daftar adalah dalam tempoh 30 tahun daripada tarikh kemasukan itu. Berdasarkan s 5 Ordinan, had masa yang ditetapkan dalam s 162(4) AS mengatasi had masa yang ditetapkan dalam Ordinan. Kemasukan defendan kedua dalam daftar yang telah dibuat pada tahun 1998 dan permohonan ini yang difailkan pada tahun 2014, permohonan ini masih dalam tempoh masa (lihat perenggan 92).]

Notes

For a case on shares of company, see 12(2) *Mallal's Digest* (5th Ed, 2015) para 3449.

For cases on dealing by company in its own shares, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1072–1076.

For cases on res judicata in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7836–8014.

For cases on Sarawak Limitation Ordinance, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2617–2618.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Ayoromi Helen v PP [2005] 1 MLJ 699; [2005] 1 CLJ 1, CA (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Fernrite Sdn Bhd v Perbadanan Nasional Bhd [2011] 6 CLJ 8, CA (refd)
Foo Fatt Chuen v Axis Identity Group International Sdn Bhd & Anor [2011] MLJU 676, HC (refd)
Grant v Grant (1865) 55 ER 776 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)
Khor Kuek Jin v Haji Yasin & Ors [1976] 2 MLJ 70; [1976] 1 LNS 51, FC (refd)
Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (refd)
Mohan Chatram MT Ramchandani v Ketua Pengarah Insolvensi Wilayah Persekutuan Kuala Lumpur [2015] 3 CLJ 354, HC (refd)
Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141, CA (refd)
Nasib Singh v Ramasamy [1969] 1 MLJ 211c (refd)
Natha Singh v Syed Abdul Rahman & Anor [1962] 1 MLJ 265b (refd)
Omega Securities Sdn Bhd v Yeo Lee Hoe [2002] MLJU 571; [2003] 1 CLJ 276, HC (refd)
Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504, HC (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)
Royal British Bank v Turquand (1855) 5 E & B 248, QBD (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765; [2009] 3 CLJ 88, CA (refd)
Starmasa Resources Sdn Bhd v Shell Malaysia Trading Sdn Bhd [2004] 5 MLJ 145, HC (refd)
Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 3 CLJ 141, FC (refd)
Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825, FC (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289; [2009] 2 CLJ 365, CA (refd)
Thangaulu v Saudagar Singh [1965] 1 MLJ 38 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Wai Hin Tin Mining Co Ltd v Lee Chow Beng [1968] 2 MLJ 251 (refd)
Wan Naimah v Wan Mohamad Nawawai [1974] 1 MLJ 41; [1972] 1 LNS 164, FC (refd)

Legislation referred to

Companies Act 1965 ss 107, 122A(1)(a), (2), 132C, 132C(1), (1)(b), (1B), (1B)(a), (1B)(b), (1B)(c), (3), 132E, 132E(1)(a), (5), 162(1)(a), (4)
Companies Regulations 1966 Form 32A
Contracts Act 1950 ss 24(e), 66
Evidence Act 1950 s 114(g)
Limitation Ordinance (Cap 49) ss 3, 5, 9, Schedule, Items 44, 72, 90, 91, 93, 97, 102

George Lim (Victor Lau with him) (PY Lau & Lu Advocates) for the plaintiff.
Kenny Yi (Yi & Co Advocates) for the first defendant.

Supang Lian J:

INTRODUCTION

[1] The plaintiff, Lau Tiong Ik Construction, was a family construction business incorporated in 1997 and run by its then managing director, Lau Choon Liong ('PW2'). The first defendant, Lau Chung Ping ('DW1'), besides being the younger brother of PW2, is a professional civil engineer and a licensed company secretary. The second defendant ('Ultra Enterprises') is a property company which owns a large piece of land in Kuching. The plaintiff is the owner and shareholder of the second defendant and had 2,001,472 shares at RM1 per share in it ('the shares' or 'the subject shares'). On 16 June 1998, the plaintiff transferred the shares to the first defendant. In 2009, the plaintiff initiated Sibu High Court Suit No 22–11 of 2009 ('the 2009 Suit') seeking a declaration that the first defendant held the shares in trust for the plaintiff and demanding for the return of the shares. However, the suit was later withdrawn and struck out. In 2012, PW2 and one other brother, Lau Chai Kung, initiated Companies (Winding Up) Petition No SBW-28–7/8 of 2012 ('WUP 28–7/8 of 2012') at Sibu High Court to wind up the plaintiff. The High Court granted the order of winding up on 23 August 2013 and appointed Wong Ching Yong ('PW1') of Messrs Wong Ching Yong & Co as the liquidator of the plaintiff.

[2] On 13 March 2014, Wong Ching Yong, the liquidator, under the name of the plaintiff filed this action to seek declaratory reliefs and the return of the shares transferred to the first defendant by the plaintiff on 16 June 1998. Only the first defendant had disputed the claim as the second defendant, although served with the writ and the statement of claim, had not entered appearance or filed any defence. The trial of the action took four days. Wong Ching Yong

(PW1) and Lau Choon Liong (PW2) gave evidence for the plaintiff, whereas, the first defendant, Lau Chung Ping (DW1), was the sole witness for himself. The documentary exhibits tendered and referred at the trial are:

(a) common agreed bundle of documents: Bundle A (Part A);

(b) common agreed bundle of documents: Bundle B1 (Part B);

(c) common agreed bundle of documents: Bundle B2 (Part B);

(d) common disputed bundle: Bundle C (Part C);

- item 40 converted to exh P2; items 35–39 (pp 595–599) converted to exh D2(a)–(e);

(e) supplementary common bundle (Vol 1) – Bundle A1:

- Part A: items 1, 14, 59; Part B: items 4–10 (pp 160–228), 50 (p 507), items 54–58 (pp 511–527), 60 (pp 529–545); Part C: items 2–3, items 11–13, items 15–49, items 51–53;
- item 12 (pp 230–231) converted to exh P1, item 13 (pp 232–272) converted to exh P3, items 2 and 3 (pp 25–60; pp 61–127) converted to exh P4 (a)–(b), item 9 (pp 160–186) converted to exh D5;

(f) supplementary common bundle (Vol 2) – Bundle A2:

- Part A: items 1 (pp 1–24), item 14 (pp 373–378), item 59 (p 528);
- Part B: items 4–10 (pp 128–228), item 50 (p 507), items 54–58 (pp 511–527), item 60 (pp 529–545);
- items 15–40 (pp 379–404) converted to exh D3; and
- items 41–49 (pp 405–506) converted to exh D4;

(g) exh D1: High Court order.

Here in after, I will refer to the documents by their bundle markings and page numbers or exhibit number.

[3] At the conclusion of trial I held that the plaintiff had proved its case on balance of probabilities. Judgment was entered for the plaintiff with costs of RM30,000. The first defendant has filed an appeal being dissatisfied with the decision.

THE PLAINTIFF'S CASE

[4] The plaintiff said that it was entitled to the return of the 2,001,472 shares that were transferred to the first defendant by the plaintiff on 16 June 1998 premised on the following:

(a) that the shares were transferred to the first defendant in trust for the plaintiff; and

(b) further or alternatively, the transfer of the shares was null and void as that was done without any approval from the general meeting of the plaintiff which is in breach of ss 132C(1)(b) and 132E(1)(a) of the CA.

THE DEFENDANT' S CASE

[5] The first defendant's defences to the plaintiff's claim are:

(a) the transfer of the shares to him was an outright sale;

(b) the transfer of the shares did not breach ss 132C(1)(b) and/or 132E(1)(a) of the Companies Act 1965;

(c) the plaintiff's claim is caught by the doctrine of res judicata;

(d) the plaintiff's claim is time-barred by s 3 of the Limitation Ordinance Sarawak (Cap 49) specifically Items 44, 72, 90, 91, 93, 97 and/or 102 of the Schedule to the Ordinance; and

(e) ss 132C(1)(b) and/or 132E(1)(a) of the Companies Act 1965 is not applicable to the transaction.

ISSUES TO BE DETERMINED

[6] Following from the pleadings, the issues to be determined were as the parties had stated in Bundles E and E1 as follows:

(a) whether the first defendant held the shares in the second defendant in trust for the plaintiff;

(b) whether the plaintiff's action is an abuse of court process and/or res judicata;

(c) whether the plaintiff's action is time-barred under the Limitation Ordinance Sarawak;

(d) whether the transfer of the subject shares between the plaintiff and the first defendant was a transaction caught by ss 132C(1)(b) or 132E(1)(a) of the Companies Act 1965; and

(e) whether the plaintiff is entitled to any relief as claimed against the first and second defendants.

THE FIRST DEFENDANT'S PRELIMINARY ISSUE

[7] Before I proceed further, I will deal with a point of law raised in the submission of the first defendant. The first defendant argued that the pleaded case and the evidence adduced by the plaintiff through PW1 and PW2 was that the shares were transferred to the first defendant to hold on trust and that such transfer on trust contravened ss 132C(1)(b) and/or 132E(1)(a) of the CA. According to the first defendant, it was not the plaintiff's case that the sale of the subject shares contravened ss 132C(1)(b) and/or 132E(1)(a) of the Act. Hence, the plaintiff's case stood or fall on trust. Citing *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616, learned counsel submitted that if a trust existed between the plaintiff and the first defendant in respect of the transfer of the shares, it would mean that: (a) the beneficial ownership of property in the shares remained with the plaintiff; (b) the first defendant was not free to deal with the shares as he liked; and (c) the plaintiff had the right to ask for the shares to be transferred back to itself. Thus, in alleging the creation of a trust, the plaintiff was saying that the subject shares were merely parked with the first defendant and there was no sale of the shares to the first defendant. Therefore, the plaintiff's allegation that the transfer of shares was null and void in breach of ss 132C(1)(b) and/or 132E(1)(a) of the Act could not stand as it was contradictory to the plaintiff's claim based on trust.

[8] With all due respect, this is misconceived. There is no denying that the pleaded case of the plaintiff was that the subject shares were transferred to the first defendant to be held on trust. But, as we have seen, that is not all that was to the plaintiff's pleaded case. As noted earlier, the plaintiff had a further case in the alternative as pleaded in paras 4 and 7B of the amended statement of claim. This pleaded case in the alternative is for a declaration that the transfer of the shares was null and void as it contravened ss 132C and 132E of the CA. It must be borne in mind that it was the first defendant's case at all times that the transfer of the subject shares was an outright business sale. If that is so, the sale would be caught by ss 132C and 132E as a business sale of a company's asset amounting to disposal. The plaintiff's case in the alternative was therefore to meet the case of the first defendant that the transfer was a genuine disposal. The logic of the plaintiff's action is simple. The shares were either held in trust and be returned to the rightful owner or the transfer was a genuine sale as alleged by the first defendant albeit caught by the provisions of ss 132C and 132E of the CA which rendered it null and void. Either way, the shares must be returned to the rightful owner. Hence, I found no merit in the preliminary issue raised by the first defendant.

Whether the first defendant held the shares in trust for the plaintiff?

Evidence for the plaintiff

[9] PW2 gave evidence that before the transfer of the shares in 1998, the plaintiff was the substantial shareholder of the second defendant by virtue of the ownership of the 2,001,472 shares with a par value of RM1 each. PW2 was also a shareholder in the second defendant and was appointed its director. He was its managing director from the year 1992 until his resignation in May 2000. In an attempt to reorganise the plaintiff company in the face of the Asia financial crisis that had hit Malaysia in 1998, PW2 as the managing director cum chairman of the second defendant, made a personal decision to transfer the subject shares to the first defendant to be held on trust. At that time the first defendant was the director of the second defendant and being his own brother, PW2 felt that the first defendant was the most appropriate person to hold the shares. Furthermore, the first defendant had indirect interest in the plaintiff company in that he held shares in there that he had transferred to his son Lau Zai Kiet on 10 February 2006. According to PW2, his relationship with the first defendant at that time was extremely good and because of the first defendant's combined interest in both the plaintiff and the second defendant, he had absolute confidence in him to hold the shares for and on behalf of the plaintiff.

[10] Consequently, PW2 approached the first defendant telling him of his decision to transfer the shares to him to hold in trust for the plaintiff until such time when it would be convenient to transfer them back to the plaintiff. The first defendant agreed to the arrangement. There were altogether 26 share certificates for the shares and it was necessary to execute the form of transfer of securities (Form 32A). For purposes of stamping, PW2 had to put a consideration for each Form 32A. Given that the arrangement was for the shares to be held in trust and honestly believing that they would be returned eventually, PW2 had simply put a price for the shares that did not truly represent their actual value. The first defendant was a party to this arrangement. Thereafter, PW2 and another brother, Law Choon King, who was also a director of the plaintiff company, signed the 26 Form 32A transfer forms (at pp 28–53 Bundle B1) on 16 June 1998. Although the consideration for the transfers were shown on the 26 transfer forms, PW2 stated that the first defendant did not pay a single cent to the plaintiff for the subject shares. This is because the first defendant knew that the transfers were not for valuable consideration as they were not a normal sale and purchase of shares between a willing buyer and seller situation but an arrangement reached between PW2 and the first defendant for the latter to hold them in trust for the plaintiff until such time when they are required to be transferred back to the plaintiff.

[11] In support of his assertions that the stated considerations had not been paid or received by the plaintiff, PW2 referred to the audited annual reports

and statement of accounts of the plaintiff for the year ending 21 December 1998 ('FYE 1998') to the year ending 31 December 2007 ('FYE 2007') (Bundle B1 pp 313–589). In the reports at the respective pages, the figure representing the consideration was classified as 'other debtors' for FYE 31 December 1998 and 31 December 1999. For the years ending 31 December 2000 until 31 December 2007, the consideration was classified as 'other receivables'. PW2 stated that this meant that the consideration was still treated as a debt owing by the first defendant to the plaintiff. The figures were put in the accounts to accommodate the consideration stated in the Forms 32A. If and when the plaintiff asked for the shares to be transferred back to the plaintiff, the consideration for the transfer would be set off against these amounts owing by the first defendant in the plaintiff's accounts.

[12] PW2 stated further that there was only one single transaction for the transfer of the shares. In explaining why there were 26 transfer forms, he said that each original share certificate contained different and numerous numbers of shares. There were altogether 26 shares certificates containing 2,001,472 shares of the second defendant. For that reason, 26 separate transfer forms were needed. In fact there was only one single transaction carried out on the same day to effect the trust arrangement.

[13] PW2 stated that being a company director he knew that according to the rules and procedure on the transfer of shares, once the transfer form had been issued, the consent of the board of directors approving such transfer must first be obtained. Further, the company shall within one month after the date on which a transfer of any shares is lodged with the company, complete and have ready for delivery all the share certificates to the transferee pursuant to s 107 of the Companies Act. In the present case, although the 26 Forms 32A were signed on 16 June 1998, PW2 as the managing director, instructed the company secretary of the second defendant not to issue any shares certificate for the shares. The reason for giving such instruction was to ensure that the first defendant could not deal with the shares by either selling or transferring them. Hence, no shares certificates were issued to the first defendant.

[14] Notwithstanding such instruction, the first defendant was able to produce the shares certificates at pp 379–404 of Bundle A2 for purposes of the trial. These shares certificates appeared to have been issued by the second defendant to the first defendant. They were all dated 27 June 2000 and all signed by the first defendant and his wife Chua Hui Ing. PW2 said it looked to be that this was done a month after he had tendered his resignation as a director on 29 May 2000. He said that in the year 2000, Chua Hui Ing was not a shareholder of the second defendant, hence, she was not qualified to be a director as stipulated under article 85 of the second defendant's memorandum of article (Bundle A1 pp 1–24). Moreover, as can be seen in the company search

(Bundle A p 10), Chua Hui Ing's name is not registered and does not appear as a shareholder or a member with the Registrar of Companies. She is also not shown as a shareholder in the second defendant's annual return of 2000 (Bundle A1 pp 140–141). Since she was not even a shareholder of the second defendant, she could not possibly act as a director for the second defendant to sign the purported shares certificates on 27 June 2000. The shares certificates were therefore illegal and invalid having been signed by a person who could not act as a director. According to PW2, the first defendant did not disclose any shares certificates at the discovery stage of the proceedings. These shares certificates had suddenly appeared after the plaintiff applied to amend its statement of claim to include this issue of no certificates having been issued. He therefore believed that they were a recent creation and an afterthought.

[15] With regard the first defendant's defence that PW2 had no authority to act for the plaintiff in the alleged arrangement for trust, PW2 stated that he was managing director of the plaintiff in 1998. He carried out the arrangement with the participation of the first defendant. In any event, if he had no authority to act for the plaintiff in that matter, then the whole arrangement would be one without authority and must be declared null and void.

[16] With regard the defence of the first defendant that he would rely on the judgment and finding of facts in Suit No SB-22 of 2011 ('SB-22 of 2011') to challenge the allegation of trust in this action, PW2 stated that the 2011 suit was a totally different action with different factual matrix. In that suit, PW2 acted as next of friend for his late mother to recover properties transferred to the first defendant. The findings in that case has no bearing on this action and an appeal against the decision is pending in the Court of Appeal.

[17] As regards the defence that the first defendant had acquired the shares on account of his financial assistance and projects rendered to the plaintiff in 1990 through his firm and company Engkalat Construction and Concept Jurutera Sdn Bhd, PW2 stated that this was not true. As the managing director of the plaintiff, he knew of no such project and financial assistance from the first defendant to justify the purchase of the shares in 1998.

[18] The liquidator, PW1, gave evidence that during the course of the liquidation process, he conducted searches and recovery processes for all assets of the plaintiff. When going through the audited financial statements of the plaintiff from 1998, he came across an item 'Other Debtors' or 'Other Receivables' (at p 585 Bundle B2) in the amount of RM1,515,059 that was stated as owing by the first defendant to the plaintiff as at 31 December 2007. His investigation led him to discover the transfer of the subject shares to the first defendant in 1998 for the purported consideration of RM1,631,465. In his search and discovery and scouring through all the available books and

accounts of the plaintiff made available to him, PW1 was not able to find any evidence to support payment of the purported consideration for the shares. Upon inquiring from PW2, he was told of the prior arrangement and agreement between PW2 and the first defendant that the shares would be transferred to DW1 and the latter would hold them in trust for the plaintiff until such time when the plaintiff would ask for them to be returned to the plaintiff. There was no payment made by the first defendant for the shares and the transfer was made without any approval from the general meeting of the plaintiff at all material times.

[19] After these discoveries PW1 wrote to the first defendant regarding the said trust but the latter denied it outright. Being appointed by the court as liquidator, he has a duty and right to recover all assets that belonged to the company. This is especially so in view that the second defendant owns huge and valuable landed properties in Kuching. The shareholders and contributories of the plaintiff could not be denied what rightly belong to them. Their fundamental interest in the plaintiff were not taken care of and hence PW1 as liquidator had brought this action to recover the shares.

Evidence for the first defendant

[20] The first defendant (DW1) gave evidence that the second defendant is in the business of housing development. In the 1980s and 1990s, the second defendant was not a profitable company and making losses most of the time. This could be seen from the annual report of the second defendant for the FYE 1998 at pp 237–253 Bundle B1 in particular at p 239 where it showed an accumulated loss of RM1,109,561. The directors at that time were PW2, Law Choon King and himself.

[21] DW1 confirmed that the subject shares were transferred to him through the 26 transfer forms at pp 28–53 Bundle B1. The transfer forms were prepared by the plaintiff under the instructions of PW2 and signed by the latter and Law Choon King as directors of the plaintiff. The subject shares were not transferred to him in trust, but sold to him by the plaintiff. The shares certificates at pp 379–404 of Bundle A2 were issued to him by the second defendant.

[22] With regard the plaintiff's claim that the amount stated in the transfer forms was only for stamp duty purposes, he said that the financial statement FYE 1998 at p 321 of Bundle B2 showed that the plaintiff received a sum of RM1,631,200 from him for the sale of the shares to him. As for saying that the amount stated in the transfer forms did not reflect the true value of the shares, he said that the second defendant had been making losses over the years before the shares were transferred to him. As a result, the capital of the second defendant was being depleted. He referred to the financial statement FYE 1997

at p 519 of Bundle A2 which showed that the accumulated losses of the second defendant up to FYE 1997 was RM1,107,477 which was financed by the paid up capital of RM3,884,838 and the capital reserve of RM364,981. He claimed that these losses resulted in the depletion of the second defendant's capital to RM3,884,838. Hence, the price per share of the second defendant was only RM0.8088 (RM3,142,342 divided by 3,884,883 shares issued). Whereas, the price of the shares transferred to him was RM0.815.

[23] According to him, the plaintiff sold the shares to him on account of the financial assistance and project support he had rendered to the plaintiff in the 1990s through his firm and company, Engkalat Construction and Concept Jurutera Sdn Bhd, when the plaintiff suffered cash flow problem. He had allowed the plaintiff to claim through Engkalat Construction a sum of RM5m under the heading 'sub-contract charges' from 1990–1998 about 40% of these subcontract charges were financial assistance to the plaintiff. The majority of Engkalat Construction payments from its projects were channelled back to back to the plaintiff as the latter was then in financial difficulty and found it hard to secure government projects due to a dispute with the government. He said that as this happened a long time ago he did not have the whole documents to prove the payment to the plaintiff. What he had to show for this was only part of the financial statement of Engkalat Construction at pp 407, 417, 430, 440, 464, 468, 478, 482, 492, 496 and 506 of Bundle A2.

Arguments of the first defendant

[24] The arguments of the first defendant for saying that the shares were not transferred to him in trust are these.

[25] In the first place, PW1 was not competent to give evidence of the creation of a trust as he had no personal knowledge of what had transpired between PW2 and the first defendant. PW1's allegations of trust came from his perusal of the documents and what was told him by PW2. Having been appointed as liquidator only on 23 August 2013, PW1 obviously had no knowledge of what transpired in 1998 between the first defendant and PW2 as he was not in the picture then.

[26] Second, PW1's allegation that the first defendant's name had appeared as a debtor in the financial statements since 1998 was misconceived as the first defendant was only a debtor of the plaintiff from 2001 onwards. The name that appeared as debtor in the statement for FYE 1998 was Lau Choon Ping and this was admitted by PW1 under cross-examination. There was no evidence that Lau Chung Ping and Lau Choon Ping were one and the same person. That was an audited and approved financial statement and the plaintiff did not call their auditor to testify in court that the name Lau Choon Ping referred to the

first defendant. Furthermore, the plaintiff could have tendered in the books of accounts to verify that there was a mistake in the name but did not do so. That this was not a mistake could be seen from the financial statement FYE 31 December 2001 where both Lau Choon Ping and Lau Chung Ping appeared concurrently as debtor. This could only mean that Lau Choon Ping and Lau Chung Ping are two different persons. The court could not fill in the gaps or assume that Lau Chung Ping and Lau Choon Ping are the same person without any evidence to the contrary.

[27] Third, the oral testimony of PW1 and PW2 on the creation of trust was contradicted by their own documentary evidence which is the audited financial statement for FYE 31 December 1998. That financial statement showed that the plaintiff's shares in the second defendant was disposed for RM1,631,200 with a loss of RM306,797. It also showed that this sum was received by the plaintiff. By saying that the shares were transferred to the first defendant in trust, the plaintiff had contradicted their own financial statement which expressly stated that the shares were sold to the first defendant and the amount of RM1,631,200 received by the plaintiff.

[28] Fourth, the plaintiff's financial statement for FYE 1998 which is produced at p 321 of Bundle B2 showed that the purchase of shares was paid for. PW1 had admitted under cross-examination that this FYE statement indeed showed that the plaintiff had received the proceeds from the sale of the shares. PW1 had also admitted that the second defendant was the only subsidiary company of the plaintiff and that the proceeds from sales of the subsidiary refer to the sales of the second defendant. This would mean that the first defendant could not be the debtor named in the FYE 1998 as the proceeds RM1,631,200 (being 2,001,472 shares x RM0.815 sen per share) had been paid. The name appearing as debtor in the FYE 1998 was one Lau Choon Ping and not the first defendant. The first defendant only appeared as a debtor of the plaintiff in the FYE 31 December 2001. As can be seen from pp 413, 444, 473, 530, 558 and 585 of Bundle B2 the amount of the alleged debt owed by the first defendant to the plaintiff does not show a sum of RM1,631,200 and the amount owed fluctuates each year. This puts paid to PW2's statement that the amount was recorded as a debt for accounting purpose. If what PW2 said is true the amount of debt would remain static.

[29] Citing *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 and *Starmasa Resources Sdn Bhd v Shell Malaysia Trading Sdn Bhd* [2004] 5 MLJ 145 learned counsel contended that the oral evidence ought to be critically tested against the whole of the other evidence and the circumstances of the case. The court should rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if

he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Counsel submitted that the entry in the statements for FYE 1998 and FYE 1999 are contemporaneous entries being recorded in the year in which they occurred. The entries in the financial statements should be given utmost weight by the court rather than the recollection of PW2 with the age of 76, at the time of testifying, on what had transpired more than 16 years ago.

[30] Fifth, the documentary evidence and the answers of PW1 and PW2 under cross-examination did not show the existence of a trust but on the contrary, showed the sale of the shares to the first defendant. For instance, PW1 provided no answer when asked why the plaintiff's shares needed to be parked with the first defendant. He merely said that it was because the first defendant is a professional engineer and the principal activities of the second defendant is that of housing development. PW2 also provided no answer to the same question merely stating that this was not the normal buy and sale in the market but a friendly family business. PW1 had also admitted under cross-examination that the FYE 2007 statement had not been approved by the directors and there was no evidence to show that the shares were transferred to the first defendant to hold in trust. PW1 also admitted that it is not stated in any of the notes to the accounts contained in the audited and approved FYE 1998 that the shares had not been paid for and neither does it say that the shares were transferred to the first defendant in trust. PW2 also admitted that there were no documents to support his allegation of trust. He agreed that he had no authority to make his personal decision to transfer the shares of the second defendant to the first defendant to be held in trust on behalf of the plaintiff without the board of directors' resolution. Furthermore, PW1 admitted that there are no books of the plaintiff as pleaded in para 3(b) of the amended statement of claim in any bundle of documents except the audited financial statements.

[31] Sixth, the plaintiff did not call the other director, Law Choon King, who had also signed the plaintiff's audited financial statements and the 26 transfer forms as a witness to testify on the truthfulness of the allegations made by PW2 on trust. Given that the plaintiff did not provide any explanation for not calling him, adverse inference must be drawn against the plaintiff under s 114(g) of the Evidence Act 1950. The plaintiff also did not call the valuer CH Williams Talhar Wong & Yeo to court to afford the first defendant the opportunity to cross-examine them on their valuation. As such, all their valuation reports were of no probative value other than to be treated as hearsay evidence.

[32] Seventh, as pleaded in para 3(e) of the amended defence, the first defendant relied on the judgment and finding of facts of Justice Yew Jen Kie in

Suit No SB-22–12 of 2011 to challenge the allegation of trust by PW2 as he had, based on two dubious documents, made a similar allegation of trust over five parcels of lands previously transferred by the first defendant's mother to the first defendant which Her Ladyship found to be fabricated and forged.

[33] Finally, the first defendant had given evidence that he had paid for the shares through his firm Engkalat Construction and had produced the firm's accounts to show that the plaintiff received monies from it for subcontract charges. These accounts were never challenged by the plaintiff during cross-examination of the first defendant.

FINDINGS

[34] In my opinion, the contention that Lau Choon Ping and Lau Chung Ping are not the same person was without merit. Based on the audited financial statements from 1999–2002 the name Lau Choon Ping appeared for the FYE statements for the years 1997, 1998, 1999, 2000, 2001 and 2002. The name changed to Lau Chung Ping in years 2003, 2004, 2005, 2006 and 2007. In his entire evidence, DW1 never denied that the Lau Choon Ping appearing in the 1998–2000 financial statements was a reference to himself. The first defendant also had never challenged the accuracy of the financial statements and did not dispute that his name Lau Chung Ping appeared in the statements from 2001 onwards as owing the plaintiff the sum stated therein. PW2 had given evidence that the two names refer to the same person, that is, his brother the first defendant. In my opinion, there was nothing inherently incredible or implausible about PW2's evidence on this for the very fact that they are brothers. Furthermore, as acknowledged by the first defendant himself, PW2 was the managing director of the plaintiff that had signed and verified the financial statements. PW2 therefore had personal knowledge of the contents of the financial statements. Hence, there was no necessity to call the auditors to come to court to testify. The question of drawing adverse inference against the plaintiff for not doing so was out of the question in my opinion.

[35] The flaw in the arguments of the first defendant is the more evident considering that from the submissions of learned counsels of both parties, it was common ground that the statement of accounts for FYE 1998 shown at pp 313–338 of Bundle B2 showed that the disposal of the plaintiff's shares in the second defendant for the sum of RM1,631,200 was to 'Lau Choon Ping'. It is significant that the first defendant's counsel had gone on to submit that, 'By saying that the shares were transferred to the first defendant on trust, the Plaintiff is contradicting their own financial statement for the year ending 31 December 1998 *which expressly state that the shares were sold to the first Defendant* and the amount of RM1, 631,200.00 received by them' (see para 5.7 of the first defendant's written submission dated 18 May 2015: encl 80).

(Emphasis added.) To my mind, in asserting that the FYE 1998 statement expressly states that the shares were sold to the first defendant, learned counsel for the first defendant had conceded that the reference to Lau Choon Ping therein is a reference to none other than the first defendant himself.

[36] Moreover, it has always been the first defendant's pleaded case, and vigorously pursued at the trial, that the transfer of shares in 1998 was to himself. It was also common ground between the parties that the transfer of shares to the first defendant is reflected in the FYE 1998 statement as a disposal of the plaintiff's shares for the sum of RM1,631,200. That being so, the first defendant could not be heard to say that the name 'Lau Choon Ping' appearing in the FYE 1998 statement and subsequent financial years did not refer to himself. Approbating and reprobating has always been frowned upon by the courts and is the bane of all litigants. It is unacceptable that the first defendant on the one hand claimed that the shares were transferred to him in 1998 as reflected in the FYE 1998 statement and then turned around to say that it was not him after all. In my opinion, it was shown beyond doubt that Lau Choon Ping and Lau Chung Ping are the same person, that is to say, the first defendant.

[37] Now, to the more weighty issue of whether the first defendant had paid for the shares in the amount stated in the FYE 1998 statement. This is critical because the payment or non-payment of the consideration would have a bearing on the question of whether the transfer deal was at arm's length between a willing seller and buyer or whether the shares were transferred to the first defendant to hold in trust for the plaintiff. The first defendant, as we have seen, said that he had paid for the shares, whereas PW1 and PW2 stated otherwise.

[38] With regard the first defendant's argument that the evidence of PW1 and PW2 was to be rejected because the plaintiff's own contemporaneous documentary evidence contradicted their assertions that no payment was made, as stated earlier, the document referred to by the first defendant was the plaintiff's audited financial statement for FYE 1998 at p 321 Bundle B2. The first defendant said that this document showed that the purchase of shares was paid for and that the plaintiff had received RM1,631,200 from the disposal of its subsidiary which referred to the second defendant.

[39] With respect, I found the contention of the first defendant to be flawed and unmeritorious. The first defendant had ignored the evidence of PW1 in explaining the FYE 1998 statement at p 321 Bundle B2. PW1 had explained by reference to the corresponding cash flow entries shown on the document itself that there was no payment for the shares and that the plaintiff did not receive the money. His explanation can be found in Q&A 37 of his witness statement

marked WSPW1 where he stated as follows:

> ... The truth is this: even though there was a record of proceed arising from the transfer of the said shares amounting to RM1,631,200.00 in 1998 account statement, the Plaintiff did not receive any money from the 1st Defendant as evidenced in the cash flows (SIC) statement for the year ended 31st December 1998 (...refer to page 321 ... Bundle B2). In the said cash flow statement, the receivable was also increased proportionately by an amount of about RM1, 600,000.00. This means there was no cash inflow of RM1, 631,200.00 which was the proceed from the transfer of the said shares to the 1st Defendant. Moreover, the cash and bank balances in the said cash flow statement for the year ended 31st December 1998 also did not increase by a proportionate amount of RM1,600,000.00. Therefore, I am of the view that the 1st Defendant did not pay the Plaintiff the amount of RM1,631,200.00 as alleged.

[40] From what PW1 had stated above, the cash flow statement for FYE 1998 showed that there was no cash inflow of RM1,631,200 which would have been the proceeds from the sale of the shares to the first defendant. The cash and bank balances in the said cash flow statement also did not increase by a proportionate amount of RM1,600,000. He said that this meant that there was no payment made by the first defendant and no payment received by the plaintiff. It is noteworthy that although deemed critical to the first defendant's case, PW1 was never cross-examined on this aspect of his evidence. This was to the detriment of the first defendant because it is a well settled rule of essential justice that wherever an opponent had declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all (see *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 at p 362 applying *Browne v Dunn* (1893) 6 R 67). In *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1 the Court of Appeal held that the failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony.

[41] Besides, PW1 is a chartered accountant, a licensed auditor and a licensed liquidator. He had perused and examined all relevant and available documentary evidence in his capacity as the court appointed liquidator. In my judgment, he was qualified to explain the audited financial statement. For that reason and coupled with the fact that he was not cross-examined on this part of his evidence, I accepted as reliable and credible his evidence that the contemporaneous document Bundle B2 p 321 in fact showed that there was no payment made by the first defendant and no payment received by the plaintiff in respect of the transfer of the shares.

[42] In this regard, it is significant that the first defendant himself, when referred to the FYE 1998 audited account at p 321 Bundle B2, acknowledged that even though it showed that the plaintiff received an amount of RM1.6m,

the page does not state from whom: see p 113 of the notes of proceedings. DW1 accepted that p 321 Bundle B2 did not show that he had paid for the RM1,631,200. As he himself had said, all the document showed was that the amount of RM1.6m was proceeds on disposal of subsidiary.

[43] Since it has been demonstrated that p 321 Bundle B2 in fact showed that there was no payment made, the contention of the first defendant that PW2's recollection at the age of 72 of events that had transpired 16 years ago could not withstand the entries in the financial statement had been effectively debunked. It also puts paid to the first defendant's contention that the evidence of PW1 and PW2 was inconsistent and clashed with the contemporaneous documentary evidence.

[44] I will move on to consider the first defendant's explanation on how he paid for the shares. He stated as follows in his witness statement (WSDW1): 'I acquired the shares on account of the financial assistance and project support I had rendered the Plaintiff through my firms and companies, Engkalat Construction and Concept Jurutera Sdn Bhd in the 1990s when the Plaintiff suffered cash flow problem. I had allowed the Plaintiff to claim through Engkalat Construction a sum of RM5 million under the heading 'sub-contract charges' from 1990 to 1998. About 40% of these subcontract charges were financial assistance to the Plaintiff. In fact the majority of Engkalat Construction payments from its project were channelled back to back to the Plaintiff as the Plaintiff was then in financial problem and found it difficult to secure government works and projects due to their dispute of claim with the government'. In brief, the first defendant is saying that the plaintiff drew on Engkalat's account up to RM5m of which, 40% was as financial assistance. In return, the plaintiff sold the shares to the first defendant purportedly in payment.

[45] I did not believe nor accept the evidence of the first defendant on this for the following reasons. Firstly, the first defendant did not identify who in the plaintiff company that had made the decision to transfer to him the shares on account of his financial assistance, and then decided the price and the manner of payment of the consideration. It is common knowledge that when a company disposes of a substantial part of its assets for valuable consideration, it must act through its board of directors or its managing director if he was so authorised to act for the company. It was also common ground that PW2 was the managing director at the relevant time. It would stand to reason that he would be the most probable person of authority to make that decision. As we have seen, he had testified that there was no such project and financial assistance from the first defendant to justify the purchase of the shares in 1998. Significantly, when PW2 was in the witness stand, the first defendant had singularly failed to cross-examine him on this matter. Neither did the first

defendant put his material case to PW2 that there was such a decision to transfer the shares to him on account of his financial assistance. Again, this was detrimental to the first defendant's position. As pointed out by Edgar Joseph Jr FCJ, in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, the point and purpose of putting one's case to the opposing witness as might be in a position to admit or deny it, is to enable the opposite side to check on the truth of the version and this avoid the adverse comment that the defence is a recent invention, in other words 'kept up the sleeves'.

[46] Secondly, there was no evidence to substantiate: (i) the first defendant's claim that plaintiff was suffering from cash flow problem from 1990 up to 1998; (ii) the first defendant's claim that he allowed the plaintiff to claim through Engkalat a sum of RM5m under the heading 'sub-contract charges' from 1990–1998 when the plaintiff was alleged to be in financial trouble; and (iii) that 40% of these 'sub-contract charges' were financial assistance to the plaintiff.

[47] The first defendant had referred to the documents at pp 407, 417, 430, 440, 464, 468, 478, 482, 492, 496 and 506 Bundle A2 in support. However, these documents were part of the 'detailed profit and loss account of Engkalat Construction' filed by the first defendant in its tax returns and nothing more. DW1 did not explain how these documents could be connected to the purported claims made by the plaintiff on Engkalat account. According to DW1, they were 'sub-contract charges' but, looking at the respective 'detailed profit and loss account of Engkalat Construction' under the heading of 'Less Administrative and operating Expenses' (see BA2 p 406) where the 'sub-contract charges' was RM2,736,357.08, this is identical to the 'sub-contract charges' of RM2,736,357.08 (at BA2 p 407) paid to plaintiff and other contractors like Lau Hong King & Sons Construction Sdn Bhd, Tiong Yong Ching & Sons Enterprise Sdn Bhd, Tan Ngian Kheng for work done for Engkalat. I agreed with the plaintiff's submission that there being these other entities, these could not be drawings made on Engkalat by the plaintiff.

[48] Again, PW2 being the managing director of the plaintiff company from the 1990s to 2009 would have been in the position to state (i) whether there were any project and financial assistance to justify the purchase of the shares in 1998; (ii) if he had approved any arrangement of such financial assistance or project support rendered to the plaintiff by the first defendant's firms and companies during that period; (iii) whether the plaintiff at that time had 'cash flow' issues and arranged with the first defendant to claim the said RM5m under the heading 'sub-contract charges' from 1990–1998; and (iv) if there was such an agreement, he as the person managing the company had agreed with the plaintiff to set off or contra this drawn up sum from the consideration of the subject shares to be transferred to the first defendant in 1998. The first

defendant neither cross-examined him nor put these matters to him when he was in the witness stand. Not only that, the documents at BA2 pp 407, 417, 430, 440, 464, 468, 478, 482, 492, 496 and 506 were never shown to PW2. He therefore was not given the chance to either admit or deny them. The authorities cited above are clear — the failure to cross-examine PW2 on these crucial matters coupled with the failure to put to PW2 the first defendant's material documents and case must be taken to mean that the first defendant believed that the testimony of PW2 on the reason for the transfer of shares to the first defendant could not be disputed at all.

[49] Thirdly, in my view, the documents at pp 407, 417, 430, 440, 464, 468, 478, 482, 492, 496 and 506 Bundle A2 in fact did not substantiate the first defendant's allegation that 40% was financial assistance rendered by the first defendant. Where did the 40% come from? Engkalat was a proprietorship and not a sole proprietorship. Concept Jurutera was a company incorporated under the Companies Act 1965. Under cross-examination the first defendant could not explain how the subject shares could have been transferred to him in his personal capacity and not to the two companies. In addition, the arithmetic does not work out — 40% of RM5m that the first defendant had allowed as subcontract charges and financial assistance to the plaintiff is RM2m and not RM1.6m. Clearly, the contemporaneous documents also did not support the first defendant's case that he had paid for the RM1.6m.

[50] To further illustrate that DW1's claim that the consideration was paid for by way of financial assistance was mere bare allegation, the excerpts of his cross-examination produced below are telling:

Page 112 of the NOP:

Q620: Show me the financial record of Engkalat or Concept P that shows the 2nd defendant at one time or another in 1990s as you alleged owed Engkalat and Concept P any money?

A: You are confusing me because the 2nd defendant has nothing to do with Engkalat.

Q621: Also in your account, can you show me any entry to show that the plaintiff owed Concept P or Engkalat money?

A: I don't understand your question.

Q622: Show me an entry in the financial record of Engkalat and Concept P that the plaintiff owed these companies money?

A: This is shown in the plaintiff's audited account.

Q623: Where?

A: In the plaintiff's audited account.

Q624: Point to one entry in such account that show the plaintiff owed Concept P or Engkalat money?

A: P 362 BB2 under 'other creditors'. This is 1999 December account of the plaintiff. It shows other creditors.
Q625: How much owing to you?
A: Shows amount RM39,613.00
Q626: For Engkalat?
A: Yes.
Q627: For Concept P Associates?
A For that year is RM6,633.
Q628: Was this any closer to the RM5 million as you claimed earlier *on?*
A: It is over 9 to 10 years period.
Q629: In the account of the plaintiff, was there any figure closer to *RM5 million as you claimed?*
A: Not sure.

In my judgment, the first defendant was not sure because there in fact was no such account to show that the plaintiff at any time in 1998 or before 1998 owed the first defendant, Engkalat or Concept any money from which he could now claim as financial assistance given to the plaintiff.

[51] For the reasons stated above, I rejected the first defendant's assertions that the documentary evidence supported his case that the transfer of the shares to him arose from a transaction at arm's length between a willing buyer and willing seller and that he had paid consideration in the sum of RM1,631,200 for them. In the face of the documentary evidence alluded to and the first defendant being unable to substantiate his allegations that he had paid for the consideration, the explanation given by PW2 for the transfer of the shares to the first defendant, although simple, was to my mind, plausible and credible. I accepted that he had engendered the transfer in the face of reorganising the plaintiff company when the Asia financial crisis hit Malaysia in 1997/1998. I accepted his further evidence that the first defendant had agreed to hold the shares in trust for the plaintiff until such a time when it would be convenient to transfer them back to the plaintiff.

[52] This leads me to the evidence of PW1. I did not agree with the first defendant that he was not competent to testify on whether the shares were transferred to the first defendant to be held on trust. We all know that he had only come into the picture after his appointment as liquidator by this court on 23 August 2013. He might not have personal knowledge, but as the court appointed liquidator, he had carried out investigations by conducting searches and recovery processes for all assets of the plaintiff. As we have seen, he had examined the documentary evidence like the audited statements from FYE 1998 which led him to the discovery of the item 'Other Debtors' or 'Other Receivables' stated as owing by the first defendant to the plaintiff as at 31 December 2007. In other words, the first defendant was stated as a 'debtor'

in the audited accounts. Upon further perusal of the available documents, he discovered that shares were transferred to the first defendant in 1998 for a purported consideration of RM1,631,465. He found no records in the books of the plaintiff and no evidence to corroborate that the purported consideration was paid or any equivalent amount having been received by the plaintiff from the first defendant. There were discrepancies between the total amount of consideration stated in the twenty six Forms 32A which is RM1,631,465 and the amount stated in the FYE 1998 statement which is RM1,631,200. He said that if the said consideration was paid, it should not be treated as owing from the first defendant to the plaintiff under the caption 'Other Receivables'.

[53] PW1 recovered the records and minute books of the plaintiff on 27 November 2014. Based on the audited annual report and statement of account of the plaintiff for FYE 31 December 1998–31 December 2007 (at pp 313–589 of Bundle B2), the last audited account of the plaintiff was for FYE 2007 He found that the first defendant owed the plaintiff the amounts as follows for the respective years:

Year ended 31 December	Amount owed by first defendant	As per page of Bundle B2
1998	1,659041.67	332
1999	1,631,336.00	357
2000	1,631,336.00	385
2001	1,481,313.00	414
2002	1,509,818.77	444
2003	1,509,816.77	473
2004	1,515,999.45	503
2005	1,514,979.45	530
2006	1,515,029.45	558
2007	1,515,059.45	585

[54] It was afterwards that PW1 had called PW2 to inquire about the 'Other Debtors'/'Other Receivables' and why there was no demand made for the payment of the purported consideration. PW2 had then told him of his decision in 1998, as managing director, to transfer the shares to the first defendant to be held in trust.

[55] Now, the documentary evidence referred to by PW1 were Part B documents, hence, their existence and authenticity were not in dispute. The first defendant himself has relied on these very same documents in his submission. PW1 admitted that not all the books and accounts were in the

bundles of documents before the court but, in my opinion, that did not affect his veracity as an impartial witness giving evidence based on the documents of the plaintiff that were put at his disposal. PW1 could not be expected to produce the entire accounts and books of the plaintiff. There is no rule of evidence that a witness must produce all documents and records however unrelated to the case. That would have been an onerous task. The best evidence would be the audited accounts of the plaintiff the truth of which was not challenged. They were before the court. In my judgment, the evidence of PW1 that there was no payment of the purported consideration and no evidence of repayment by the first defendant to the plaintiff was credible because his evidence was based on the documentary evidence. I considered his evidence as strong support for the evidence of PW2 that the shares were transferred to the first defendant to be held in trust.

[56] As regards the reliance on the finding of facts and assessment of credibility by the learned High Court judge in SBW-22–12 of 2011 to challenge the allegation of trust by PW2, in my opinion, it is misplaced. As we have seen, PW2 in that case had commenced the suit as the next friend of Tian Ai Hwa, the mother of the first defendant and PW2, against the first defendant and two others seeking a declaration that five parcels of land that had been transferred to the first defendant by the mother were transferred to be held in trust. In support of his allegation of the creation of a trust, PW2 had produced two documents which were tendered as exhibits at the trial. The learned High Court judge made a finding of fact that the two documents were fabricated and forged and rejected the allegation of trust over the five parcels of land. Counsel for the first defendant submitted that this case demonstrated that PW2 was a very dishonest and unreliable witness and should not be believed. I disagreed. The finding of fact in that case, namely, that the two documents were a fabrication and forged, were specific to that case based on the evidence adduced before the learned trial judge and the assessment of the credibility and veracity of witnesses. To my mind, to invite the court to impute dishonesty or unreliability of a witness based on the finding of fact by a tribunal in a different case where the facts and issues are not the same, is without precedent. It is asking the court to judge without hearing. If such a proposition were countenanced, many can never have their day in court. I rejected the proposition.

[57] I move on to consider the first defendant's contention that Law Choon King should have been called to corroborate the plaintiff's claim. The evidence was clear that Law Choon King was never a party to the arrangement reached between PW2 and the first defendant in respect of the shares. Hence, there was no necessity to call him to testify. It was counsel for the first defendant, whilst cross-examining PW2 that had raised the issue of whether Law Choon King knew of the trust. PW2 testified that he had only informed Law Chung King

of the arrangement on trust just before the latter was going to sign the share transfer forms. To my mind, even if Law Chung King were called to testify, it would only be to confirm or disprove that PW2 had told him subsequently after the trust was created. His testimony as such would merely amount to hearsay. His evidence was unnecessary because his evidence was not material to the matrix of the plaintiff's case and therefore there was nothing else for the plaintiff to prove that needed his evidence. The reality was that PW2 was the crucial witness for the plaintiff and he did testify.

[58] It is a fundamental principle of the law of trusts that in order to establish an express trust, three elements would need to be satisfied, namely: (a) certainty of intention; (b) certainty of subject-matter; and (c) certainty of objects: see *Halsbury's Laws of Malaysia*, 2009 Reissue, 11(1), (310.004). There is no specific format and a declaration of trust may be made quite informally provided that the words are clear and unequivocal: see *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41; [1972] 1 LNS 164, FC. Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are sufficient for the purpose of creating the trust: see *Grant v Grant* (1865) 55 ER 776 at p 777. In the present case, I accepted the evidence of PW2 that he had approached the first defendant and told him that he had decided to transfer the shares to him to be held on trust until such a time when it would be convenient to transfer them back to the plaintiff. Hence there was certainty of intention that the shares were to be transferred to the first defendant to be held in trust. The subject-matter was certain as well in the form of the 2,001,472 ordinary shares of the second defendant belonging to the plaintiff that were to be transferred. The same is true of the object which was that the shares were to be returned to the plaintiff at the appropriate time. I therefore found that an express trust was created.

[59] Even if there had been no express trust, I would say that a constructive trust had been created. The Court of Appeal in *Fernrite Sdn Bhd v Perbadanan Nasional Bhd* [2011] 6 CLJ 8 stated that a constructive trust is one that arises by operation of law and imposed by equity by reason of justice and good conscience. In *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765 at p 766; [2009] 3 CLJ 88 at p 89, Abdul Malik Ishak JCA listed the characteristics of a constructive trust as follows:

(a) it arises by operation of law;

(b) it does not depend on the express intention of the settlor like the case of a private trust;

(c) it is not dependent on the presumed intention of the settlor like the case of an implied trust as well as the resulting trust; and

(d) it depends on the conduct of the parties (*Khor Kuek Jin v Haji Yasin & Ors* [1976] 2 MLJ 70; [1976] 1 LNS 51).

His Lordship added that a constructive trust is to be imposed so as to prevent an unjust enrichment.

[60] The conduct of the parties may lead the court to impute a constructive trust to prevent unjust enrichment. This is explained in *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 365 where Mohd Ghazali Yusoff JCA stated at p 335 (MLJ); p 416 (CLJ):

> [95] ... we are of the view that there will be unjust enrichment if the defendants were allowed to keep the said shares. The learned judge was right in imputing ... a constructive trust whereby the first defendant held the said shares on trust for the deceased's estate. Having regard to his conduct, and in not being able to prove his claim that the said shares were given gratuitously to him by the deceased and his conduct in transferring the 4 million shares to the third defendant notwithstanding his undertaking given to the court, it would be inequitable to allow him to deny the deceased's estate of the said shares. The relevant principles of trust law have been laid down in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961; [1996] AC 669 by Lord Browne-Wilkinson at p 705; he said: (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

[61] In the present case, for the reasons stated earlier, I found it proven that the first defendant had not paid towards the transfer of the shares. Despite the arrangement between PW2 and the first defendant in 1998 that the shares were to be transferred in trust to the first defendant, the latter had turned around to claim that he had paid for them and they belonged to him. It was not difficult to discern the change of tack in his conduct. PW1 had given evidence that according to the valuation by CH William Talhar Wong & Yeo, the landed properties held by the second defendant in Kuching are now worth about RM22m whereas their gross development value is worth more than RM39m. Now, the first defendant had contended that the report of the licensed valuer has no probative value because the valuer was not called to testify. I noted that the first defendant did not raise objection when the report was tendered and no challenge was made on its authenticity or content. In any event, the first defendant did not adduce or tender any competing expert valuation of the landed properties belonging to the second defendant to show otherwise. In the absence of other competing expert valuation report, the weight of the probative value should tilt to the plaintiff's scale given that the first defendant's scale was totally empty. Accordingly, I accepted the valuation made by CH William Talhar Wong & Yeo.

[62] In my judgment, there was no doubt that the first defendant would be unjustly enriched at the expense of the genuine contributories and creditors of the plaintiff company if he were allowed to keep the subject shares for which he did not pay a single cent. A constructive trust therefore must be imputed on the first defendant. I so held.

[63] In conclusion on this issue, for the reasons stated above, I found and held that the plaintiff had proved on balance of probabilities that the first defendant held the subject shares in trust for the plaintiff company.

Whether the plaintiff's action is an abuse of court process and/or res judicata

[64] The first defendant contended that this action was not the first time that the plaintiff had come up with such allegations of trust because the plaintiff had in 2009 commenced the same action against the first defendant in Sibu High Court Suit No 22–11 of 2009 alleging the same thing. Suit No 22–11 of 2009 was subsequently withdrawn and struck out. Since the plaintiff had withdrawn that suit, the plaintiff ought not to be allowed to re-litigate the matter again.

[65] I disagreed with the first defendant on this. As we have seen, PW2 gave evidence that in 2009, when he was still managing director of the plaintiff, he had instructed Messrs Battenberg & Talma to represent the plaintiff to file Suit No 22–11 of 2009 to recover the subject shares from the first defendant. However, the first defendant acting in concert with Law Choon King, Law Choon Hoe and Lau Zai Kiet had him removed as director and managing director. Incidentally, this was the finding of fact that I made in the winding up court in Suit No SBW-28–7/8 of 2012. After the removal of PW2 as managing director, Law Choon King was appointed as managing director of the plaintiff. He refused to give instructions to the said legal firm to proceed with Suit No 22–11 of 2009 and challenged their authority to act for the plaintiff. Faced with no mandate, the legal firm could not proceed. Thereafter, Law Choon King had the suit withdrawn and struck out in the same year. This was before the pleadings were closed. There was no adjudication of the case and no finding made by the court on the merits of the claim. In the circumstances, I found the contentions of the first defendant that the matter is res judicata and therefore an abuse of court process to be unmeritorious if not vexatious.

Whether the transfer of the shares was a transaction caught by ss 132C(1)(b) or 132E(1)(a) of the Companies Act 1965

[66] This was one of the agreed issues to be tried which I had considered for completeness. It is only relevant in the event I am wrong in concluding that the defendant held the shares in trust for the plaintiff.

[67] The first defendant argued that since the transfer of the shares were done in 1998, the provisions of the old ss 132C and 132E of the CA should apply instead of the current provisions which took effect after the amendments introduced by the Companies (Amendment) Act 2007 on 15 August 2007. Given that PW1 had given evidence on the current sections which are not applicable to the present case, the plaintiff had failed to prove that the transaction contravened the provisions of ss 132C or 132E of the Act as at 1998. I did not agree with the first defendant on this and I will explain.

[68] I agreed with the first defendant that it was the provisions of ss 132C(1)(b) or 132E(1)(a) as they stood at the time of the transaction, that is to say, in the year 1998, that are applicable. However, I did not agree that PW1's evidence based on the current provisions was of no relevance at all to the plaintiff's case that the transaction contravened the two sections. I will consider s 132C(1)(b) first.

Section 132C(1)(b) (pre-amendment)

[69] Section 132C(1)(b) is to be read with s 132C(3). They read as follows:

> 132 Approval of company required for disposal by directors of company's undertaking or property
>
> (1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for —
>
> (a) ...
>
> (b) the disposal of a substantial portion of the company's undertaking or property, which would materially and adversely affect the performance or financial position of the company unless the proposal or transaction has been approved by the company in general meeting.
>
> (2) A transaction entered into in contravention of subsection (1) shall, in favour of any person dealing with the company for valuable consideration, and without actual notice of the contravention, be as valid as if that subsection has been complied with.

[70] The question therefore is whether the sale of the shares to the first defendant constituted a disposal of a substantial portion of the company's property, which would materially and adversely affect the performance or financial position of the company. It was unfortunate that counsels from both sides did not cite any case authority on what constitutes a substantial portion of the company's property which would materially and adversely affect the performance or financial position of the company as stipulated in the old s 132C(1)(b). However, it is to be noted that by the 2007 amendments a new

sub-s (1B) was added to s 132C. It reads:

> (1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if —
>
> (a) its value exceeds twenty-five per centum of the total assets of the company;
>
> (b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or
>
> (c) its value exceeds twenty-five per centum of the issued share capital of the company.

[71] Hence, this new subsection defines what constitutes an undertaking or property which is of a substantial value and a portion of the company's undertaking or property which is of a substantial portion. In my judgment, the legislative intent for this additional provision must be to alleviate the need for the courts to painstakingly determine what constitutes 'substantial property' under the old s 132C. I take the view that there is nothing to stop this court from relying on the definitions provided in the new sub-s (1B)(a), (b), (c) as guidelines.

[72] In this regard, I agreed with PW1 that as the shares were disposed of in 1998, it is necessary to refer to the audited financial statement FYE 1998 to calculate the 'substantial value'. The benchmark is RM1,937,997 as this was the cost of the shares disposed by the plaintiff to the first defendant as shown at p 319 Bundle B2. PW1 gave unchallenged evidence that the same page also showed that before the transfer of the shares, the amount in the account for 1997 was RM1,937,997. After the transfer in 1998, the amount was blank.

[73] PW1 also gave evidence that was not challenged that taking the first scenario as provided in the current sub-s (1B)(a) above, the total assets of the plaintiff for FYE 1998 was negative in value ie accumulated loss of RM6,932,343. Going by the second scenario in (1B)(b), the net profit after tax for the plaintiff for FYE 1998 was a loss of RM549,109. Under the third scenario in (1B)(c), the paid up capital of the plaintiff as at 31 December 1998 was RM1m. Therefore, 25% of the paid up capital was RM250,000. Of the three scenarios, the third is the highest. I agreed with PW1 that given the cost of the shares was RM1,937,997, which was higher than RM250,000, the transaction was to be considered as substantial. Hence, guided by the definition in the current sub-s (1B), the transaction effected in 1998 amounted to a substantial disposal of the company's property.

[74] In any event, as we have seen, PW1 gave evidence that the carrying costs of the shares in the plaintiff's account was RM1,937,997. PW1 had produced the letter from the licensed valuer Messrs CH Williams Talhar Wong & Yeo (exh P1) to show that the lands in Kuching owned by the second defendant were worth RM5,817,000 in year 1998. In my view, going by the carrying costs of the transfer of the shares in the sum of RM1,937,997, it cannot be denied, that the sale of the shares to the first defendant constituted a disposal of a substantial property of the plaintiff which would materially and adversely affect the financial position of the plaintiff.

[75] In the circumstances, approval of a general meeting of the plaintiff was required for the disposal in 1998 of the shares to the first defendant. The evidence adduced before the court was incontrovertible that the transaction had never been approved by the company in a general meeting. Speaking for the Federal Court in *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 3 CLJ 141 at para 21, Ramly Ali FCJ stated that the failure to obtain the approval of the shareholders in a general meeting would render the disposal invalid and void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention. Although the Federal Court in *Tan Chee Hoe* was considering the current s 132C(1B), the effect of both the old and current provisions in the event of contravention of the statutory requirement is the same.

[76] This leads me to the question of whether the first defendant had bought the shares for valuable consideration and without actual notice of the contravention. It is well settled that a party that asserts he or she is a bona fide purchaser of the property for valuable consideration bears the burden of proof: see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 at p 530; [1998] 1 CLJ 793 at p 854 (FC); *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96 (FC); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at p 209; [1995] 1 CLJ 293 at p 307 (CA); and *Mohan Chatram MT Ramchandani v Ketua Pengarah Insolvensi Wilayah Persekutuan Kuala Lumpur* [2015] 3 CLJ 354 (HC). I noted that the first defendant had singularly refrained to state in his evidence that he had paid by cash, cheque or any other valuable consideration for the shares. His only chosen answer which is found in his witness statement in Q & A 13 is his claim that the plaintiff had sold him the shares to account for the financial assistance he had given to the plaintiff via his firm and company. I had earlier in this judgment demonstrated that this chosen answer and explanation from the first defendant was not proven. I stand by what I said. Hence, the first defendant had failed to prove on balance of probabilities that he was a purchaser for valuable consideration.

[77] With regard the issue of no actual notice of non-compliance, it was held

in *Pekan Nenas Industries*, at p 508 (MLJ); p 829 (CLJ) that the burden of showing lack of notice is on the person invoking the doctrine. The first defendant gave evidence that he bought the shares at their value of RM9.815 per share in an arm's-length transaction without advantage given to him. Section 132C(1)(b), he said, applies to the directors of a company and he was neither a director nor a shareholder of the plaintiff in 1998. That being the case, he was not in the position to comply with the provisions of the Companies Act or the memorandum of articles at the time of the transfer of the shares to him. He was not aware that the plaintiff had failed to comply with the relevant provisions as he had no knowledge of its internal management and had no right to insist on proof from the plaintiff that the relevant provisions of the Act had been complied with. Hence, the mainstay of the first defendant's contention was that he had no knowledge of the internal management of the plaintiff with regard the transfer considering that he was not the plaintiff's director in 1998. This of course is invoking the rule in *Royal British Bank v Turquand* (1855) 5 E & B 248. Edgar Joseph Jr JCA, speaking for the Federal Court in *Pekan Nenas Industries* stated as follows in relation to the rule (at pp 507–509 (MLJ); pp 828–830 (CLJ)):

> The rule in *Turquand*'s case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity. ... Furthermore, outsiders dealing with a company would also be affected by knowledge of facts which would put a reasonable *person on inquiry;* in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool), Limited v Barclays Bank, Limited* [1928] 1 KB 48 at p 56 Wright J ... said:
>
> > Whatever may be the exact scope of the rule in *Turquand's* case I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied on by a person who has been put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule ...
>
> And, in *Morris v Kanssen* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the *Turquand* Rule if he is put upon inquiry. Here is what his Lordship said on this point (at p 475):
>
> > He cannot presume in his own favour that things are rightly done if in [SIC] inquiry that he ought to have made would tell him that they were wrongly done.
>
> ... The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction (see *Kanssen v Rialto (West End) Ltd.* [1944] Ch 346; *Morris v Kanssen* [1946] AC 459). ... The very nature of a proposed transaction may put a person on inquiry as to the authority of the directors to effect it even if he has no special relationship with the company (see *Rolled Steel Ltd v British Steel Corporation* [1986] Ch 246, at p 285). ... Whether in any given case,

the person dealing with a Company is put upon inquiry must depend upon all the particular circumstances (per Glade LJ in *Rolled Steel Ltd ibid* at p 285).

[78] The short of it is that to be put upon inquiry, it is not necessary that an outsider receives notice directly. It would suffice if the circumstances are such that he is really put on inquiry such that a duty to inquire is to be imputed on him.

[79] As we have seen, I accepted the evidence of PW2 that he had in 1998, with the full knowledge of the first defendant in the face of the Asia financial crisis, decided to reorganise the plaintiff company and transfer the shares to the first defendant to be held in trust until such time when it was convenient to transfer them back to the plaintiff. The transferred shares, it will be recalled, were shares of the second defendant which are owned by the plaintiff. It also must be borne mind that the first defendant in 1998 was a director of the second defendant. Hence, the second defendant had a special relationship not only with the plaintiff but also with the second defendant, the source of the transferred shares. Further, based on the evidence of both PW2 and the first defendant, the parties never entered into a formal sale and purchase agreement on the transfer of the shares. Moreover, despite the second defendant having landed assets, no valuation was ever carried out to determine the market value of its landed properties at the time of the transfer. Next, at the time of the transfer in 1998, no shares certificates were issued from the second defendant to the first defendant despite the latter's position as the managing director of the second defendant by then. We have seen how the first defendant at the trial had produced purported shares certificates at pp 379–404 of Bundle A2 which appeared to have been issued by the second defendant to the first defendant. I was convinced and found that these shares certificates were not genuine but recent creations by the first defendant after the transfer of shares in 1998. The shares certificates were all dated 27 June 2000 and this was a month after PW2 had tendered his resignation as a director on 29 May 2000. Furthermore, all were signed by the first defendant and his wife Chua Hui Ing notwithstanding that the latter was neither a shareholder of the second defendant nor a registered member on 27 June 2000. In my judgment, she could not act as a director to sign the purported shares certificates at the material date, hence, the purported shares certificates were invalid. Finally, it must not be forgotten that the first defendant is a licensed company secretary and had been a director of his own companies. It was implausible that he would have no knowledge of the requirement of compliance with s 132C.

[80] Given the surrounding circumstances at the time of the transaction, especially that the first defendant was a director of the second defendant at the material time, the first defendant, in my judgment should have been put on

inquiry as to the authority of PW2 to effect the transfer of the shares to him. The first defendant therefore could not be heard to say that he was entitled to invoke the benefit of the rule in *Turquand*. I therefore found and held that the first defendant had failed to prove on balance of probabilities that he was a purchaser without actual notice of the contravention.

[81] The Federal Court in *Tan Chee Hoe*, at para 24 stated that the effect of the old and new sub-s 3 of s 132C of the CA on the status of a third party dealing with the company is still the same, ie it loses the benefit of the statutory rule in s 132C(1) if the third party had actual notice of the contravention or non-compliance. Further, such transaction or agreement is void and invalid (not voidable) as against the whole world including the third party. As we have seen, not only had it been established that the first defendant had actual notice of the contravention, it was also established that he was a purchaser without valuable consideration. The first defendant could not rely on the exception under s 132C(3) to enforce the transaction and the transaction is void and invalid against him.

Section 132E(1)(a) of the Companies Act 1965 (pre-amendment)

[82] The section reads:

> 132E Substantial property transaction involving directors —
>
> (1) Subject to section 132F, a company shall not enter into any arrangement or transaction with a director of the company or its holding company or with a person connected with such a director to acquire from or dispose to such director or person any non-cash assets of the requisite value unless the arrangement or transaction is first approved by a resolution of the company in general meeting and also, if the director or connected person is a director of its holding company or person connected with such a director, by a resolution of the holding company in general meeting.
>
> (2) An arrangement entered into in contravention of subsection (1) and any transaction entered into in pursuance of the arrangement (whether by the company or any other person) shall be voidable at the instance of the company unless the arrangement and transaction are, within reasonable period, ratified by the company in general meeting and also, if the arrangement and transaction are for the transfer of an asset to or by a director of its holding company, or a person who is connected with such a director, by a resolution of the holding company in general meeting.
>
> ...
>
> (5) For the purposes of subsection (1), a non-cash asset is of the requisite value if, at the time of the arrangement or transaction for the acquisition or disposal of the asset, its value is not less than ten thousand ringgit but (subject to that) exceeds two hundred and fifty thousand ringgit or ten per centum of the company's asset value, that is —

(a) except in the case falling within paragraph (b), the value of the company's net assets determined by reference to the accounts prepared and laid under Part VI in respect of the last financial year prior to the arrangement or transaction; or

(b) where no accounts have been so prepared and laid before that time, the amount of the company's called-up share capital.

[83] The first defendant referred to *Foo Fatt Chuen v Axis Identity Group International Sdn Bhd & Anor* [2011] MLJU 676 to say that there are material differences between the old and new provisions, but did not explain the material differences that would take the present case out of the old provisions or whether the evidence adduced by the plaintiff was insufficient to meet the requirements. The pre-amended provisions were considered in *Omega Securities Sdn Bhd v Yeo Lee Hoe* [2002] MLJU 571; [2003] 1 CLJ 276 and Ramli Ali J (now FCJ) stated at pp 281–282:

> In order to invoke the provisions of s 132E of the Companies Act 1965, the following ingredients must be available:
>
> (i) the transaction is between the company and a director of the company or a director of its holding company or with a person connected with such director;
>
> (ii) the transaction involves an acquisition from or disposal of any non-cash assets between the company and the said director or connected person;
>
> (iii) the said non-cash assets involved must be of a requisite value ie, not less than RM10,000 but (subject to that) exceeds RM250,000 or 10% of the company's assets value (as defined under s 132E(5) of the Act).
>
> If all those ingredients are available, then the said transaction shall not be entered into by the company unless it is first approved by a resolution of the company in a general meeting and also, if the director or connected person is a director of its holding company, a resolution of the holding company in general meeting.

[84] I agreed with learned counsel for the plaintiff that the evidence adduced was sufficient to establish that the transaction between the plaintiff and the first defendant satisfied the three elements spoken of in *Omega Securities*. In the first place, there is no dispute that the first defendant is the brother of the plaintiff's managing director in 1998, namely, PW2. Under s 122A(1)(a) and (2) of the CA, a brother of a director is a person connected to such a director. Ergo, the first defendant is a person connected to such a director. Secondly, the transaction was a transfer of the shares from the plaintiff company to the first defendant, a person connected to a director. The first defendant therefore had acquired the non-cash asset that the company had disposed of. Thirdly, by the first defendant's own evidence, the shares were at least worth RM1,631,200 thus meeting the requirement that the value is not less than RM10,000 but exceeds RM250,000. In view that the transaction was not first approved by a

resolution of the plaintiff's general meeting, the transaction was in breach of s 132E. PW1 had given unchallenged evidence that at all material times no resolution of the general meeting was ever passed pertaining to the transaction. The transaction was therefore voidable at the instance of the company. By filing this action and seeking the declaratory reliefs, the plaintiff had made it clear that it wanted to have the transfer declared void.

Consequence of the transaction being void and invalid

[85] As stated in *Tan Chee Hoe & Sons*, at paras 55 and 59, s 66 of the Contracts Act 1950 is clear on this point that when a contract becomes void (as in the present case) the party who has received any advantage under the contract or agreement is bound to restore it to the person to whom he received it. Hence, the first defendant in the present case was bound to restore the shares to the plaintiff by transferring them back to the plaintiff.

Whether the plaintiff's action is time-barred under the Limitation Ordinance Sarawak

[86] It was contended for the first defendant that the plaintiff's claim is based on an alleged oral trust as there is no trust deed or written instrument executed between the parties. The alleged trust between the plaintiff and the first defendant is merely an oral contract between them whereby the first defendant allegedly held the shares until such time as the plaintiff ask him to transfer them back. The burden of proof is on the plaintiff to prove that their claim falls within the limitation period once limitation is pleaded as a defence: see *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504. The plaintiff had not adduced any evidence to prove that their case falls within the limitation period.

[87] Further, the shares were transferred to the first defendant on 16 June 1998. Under cross-examination, PW2 said that the plaintiff only demanded the shares back in 2008 or 2009. The plaintiff only commenced this action against the first defendant on 13 March 2014 after a lapse of five to six years after the alleged demand was made or more than 16 years after the alleged creation of trust. The first defendant therefore submitted that the limitation period applicable is under Item 93 of the Sarawak Limitation Ordinance which applies to oral contracts. Under Item 93, the limitation period is three years commencing from the date of the alleged demand by the plaintiff on 2008 or 2009. Whichever year is taken the plaintiff's claim is time-barred as it is only filed on 13 March 2014 which is a period of more than three years.

[88] I did not agree that the present case falls within Item 93 of the Schedule of the Sarawak Limitation Ordinance. The item reads as follows:

For compensation for the breach of any contract express or implied, not in writing

> and not herein specifically provided for ... period of limitation is 3 years ... time begins to run from when the contract is broken ...

Item 93 in my opinion is concerned with claims for compensation for breach of contracts which the present claim is not. It is therefore not applicable.

[89] Rather, the applicable provision is s 9. It reads:

> Notwithstanding anything contained in sections 3 to 8 inclusive, no suit against a person in whom property has become vested in trust for a specific purpose, or against his legal representatives or assigns, not being assigns from valuable consideration, for the purpose of following in his or their hands such property, shall be barred by any length of time.

As we have seen, the shares in the present case had become vested in trust in the first defendant for a specific purpose. For that reason, this suit against him was not barred by any length of time.

[90] In any event, the plaintiff's claim could also come within the ambit of Item 97 which reads:

> Suit for which no period of limitation is provided elsewhere in this Schedule ... limitation period is 6 years ... time begins to run when the right to sue accrues.

This suit is for the return of the shares held in trust by the first defendant. Since there is no provision elsewhere in the Schedule for such claims, Item 97 should apply. Hence, time begins to run when the right to sue accrues.

[91] In *Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825 the Federal Court considered the question of when does a cause of action accrue. Their Lordships stated at p 610 (MLJ); p 836 (CLJ): 'It is established that the cause of action normally accrues where there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed'. In my opinion the right to sue in our present case accrued when the plaintiff became aware that the first defendant refused to return the shares to the plaintiff. This arose when the plaintiff demanded for the return of the shares in 2009 by commencing Suit No 22–11 of 2009 in the Sibu High Court but the first defendant disputed the claim. Since the present suit was commenced in 2014 it is well within the limitation period of six years.

[92] In the event either s 9 or Item 97 are inapplicable, the plaintiff can still fall on the provisions of the Companies Act. The plaintiff as we know claimed for the return of the shares and for rectification of the register of the second defendant by cancelling the name of the first defendant and restoring the name

of the plaintiff as owner of the shares. Section 162(1)(a) of the CA gives the court the power to rectify the share register if the name of any person is entered in without sufficient cause. As we have seen, the transfer of the shares to the first defendant was in contravention of ss 132C and 132E of the CA rendering the transfer or transaction null and void. For that reason, the name of the first defendant in the share register was entered in without sufficient cause. Under s 162(4) of the CA, the time limit for the application to rectify the register is within 30 years of the making of the entry. It is to be noted that by virtue of s 5 of the Sarawak Limitation Ordinance, the period of limitation prescribed in s 162(4) of the CA prevails over any prescribed in the Ordinance. Section 5 reads:

> When, by any special law now or hereinafter in force in Sarawak, a period of limitation is especially prescribed for any suit, nothing herein contained shall affect or alter the period so prescribed.

The entry in the register of the second defendant having been made in 1998 and the present application filed in the year 2014, the application was well within time.

[93] It followed from what has been said above that the first defendant failed in his plea of limitation.

ILLEGALITY ISSUE

[94] The first defendant raised the issue of illegality after the conclusion of trial and during submission. Counsel for the first defendant argued that even if the allegation of a trust were true, the court must look closely at the circumstances and the purpose of the trust. According to PW2, the shares were transferred to the first defendant as he was restructuring the plaintiff due to the Asian financial crisis. The first defendant contended that the motive behind this restructuring and the transfer of the shares to the first defendant was to prevent the creditors of the plaintiff at that time getting their hands on the shares. According to the first defendant this is shown by the averments of the plaintiff in para 3 of the statement of claim in Suit No 22–11 of 2009. The plaintiff averred as follows in para 3:

> Faced with the economic meltdown of 1997 and mounting pressure from creditors who were trying to wind up the company and with the concurrent (SIC) of Defendant the share were transferred to the Defendant to be held on trusts until such time as the Plaintiff will ask the Plaintiff to transfer back the said shares.

[95] The first defendant submitted that such arrangement was illegal being an attempt to defraud the plaintiff's creditors by preventing them from realising the shares to pay off the plaintiff's debts. Such an arrangement was

unlawful and void under s 24(e) of the Contracts Act 1950 for being immoral or opposed to public policy. The first defendant submitted that illegality need not be pleaded. The court is obliged to act on it once it is brought to the attention of the court before whom the action is being tried: see *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141; *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161; *Thangaulu v Saudagar Singh* [1965] 1 MLJ 38; *Wai Hin Tin Mining Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251; *Nasib Singh v Ramasamy* [1969] 1 MLJ 211c; and *Natha Singh v Syed Abdul Rahman & Anor* [1962] 1 MLJ 265b.

[96] The proposition in law laid down in the cases cited by learned counsel for the first defendant is well settled. However, I found the first defendant's allegation of illegality to be unsubstantiated because it was not premised on any evidence or facts adduced at the trial. As can be seen, the first defendant had merely relied on the previous pleading of the plaintiff in Suit No 22–11 of 2009. This suit, as we all know, was withdrawn at an early stage which meant that the pleadings would have been open for amendment if any. Furthermore, the fact that it did not proceed to trial meant that no evidence was led to establish any illegality. It is well settled that pleading is not evidence. In my judgment, it was fallacious to rely on the pleadings in the withdrawn suit that had not gone to trial to ground the allegation of illegality.

[97] Furthermore, a careful reading of para 3 of the statement of claim in Suit 22–11 of 2009 (produced above) would reveal that there never was a pleading to the effect that the purpose of the trust was to avoid creditors' reach on the plaintiff's assets in the year 1998. In my opinion, the first defendant had taken the words of the paragraph out of context and attributed to it his own interpretation. That was misleading.

[98] In addition, no evidence whatsoever was adduced at the trial to suggest that the plaintiff could not pay any creditor. Neither was there evidence adduced to show that any creditor was trying to attach the assets of the plaintiff in the year 1998 or that the plaintiff was trying to avoid such liability. In my judgment, there was no question of illegality having been established in the evidence adduced at the trial. In the premises, I dismissed for being unsubstantiated the allegation of the first defendant that the transaction was illegal.

[99] I must say this. The first defendant's case that the transaction was illegal and thereby caught by s 24(e) of the Contracts Act 1950 is not without irony. If the consideration or object of the agreement between the plaintiff and the first defendant is unlawful for being immoral or opposed to public policy as the first defendant had contended, then it would follow that the agreement was void. This precisely was what the plaintiff had contended all along but by way

of ss 132C and 132E of the CA. We all know the consequences of a contract that is void. This was discussed earlier. The first defendant's contention on illegality if taken to its conclusion, would mean that the first defendant as the party that had received the advantage (by virtue of the acquisition of the shares) under the void agreement was bound to restore the advantage (in this case the shares) by transferring the shares back to the plaintiff. I wondered if the first defendant had carefully considered the implication of raising this issue in the first place.

CONCLUSION

[100] For the reasons given above, I found that the plaintiff had proved on balance of probabilities that the shares were transferred to the first defendant in 1998 on the understanding that the first defendant should hold them in trust for the plaintiff. In any event, the transfer of the shares to the first defendant was a contravention of either ss 132C or 132E of the Companies Act 1965 which rendered the transaction null and void. The contentions of the first defendant that the plaintiff's action was time-barred and an abuse of court process or res judicata were without merit. Accordingly I entered judgment for the plaintiff and made the following orders:

(a) a declaration that the 2,001,472 ordinary shares of RM1 per share in the capital of the second defendant now standing in the name of the first defendant are held in trust by the first defendant for the plaintiff absolutely;

(b) a declaration that the transfers of the said shares between the plaintiff and the first defendant were made in breach of ss 132C(1)(b) and 132E(1)(a) of the Companies Act 1965 and are null and void and the register of the second defendant shall be rectified accordingly by cancelling the name of the first defendant and restoring the name of the plaintiff as the owner of the said shares and the plaintiff forthwith lodge a copy of the order with the Companies Commission of Malaysia for the cancellation of the first defendant's name and the restoration of the plaintiff's name;

(c) that the first defendant do surrender up all the share certificates of the said shares (if any) and transfer the said shares to the plaintiff;

(d) that the deputy registrar/senior assistant registrar do on behalf of the first defendant signs all relevant memorandum of transfer of the said shares back to the plaintiff should the first defendant failed, refused or neglected to sign the MOT after a lapse of seven days after demand in writing from the plaintiff;

(e) if the first defendant refuses to surrender up the shares certificates after the seven days from the demand, the second defendant is to cancel the

said share certificates and to re-issue new certificates in replacement to facilitate the transfer of the said shares back to the plaintiff; that the liquidator of the plaintiff shall be at liberty to deal with the said shares upon transfer pursuant to the order of the High Court dated 23 August 2013 in WUP 28–7/8 of 2012; and costs to the plaintiff in the sum of RM30,000.

Order accordingly.

Reported by Kanesh Sundrum